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No. 85-1292

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

M.C.C. OF FLORIDA, INC.

and

MICHAEL CONSTRUCTION COMPANY,
Petitioners

v.

UNITED STATES OF AMERICA

and

STATE OF FLORIDA,
DEPARTMENT OF ENVIRONMENTAL REGULATION,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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1. In its brief in opposition, the United States concedes that this case involves "disputed questions of fact that might have been submitted to a jury." Br. in Opp. 5. The Government suggests, however, that a jury trial was not necessary because these questions "were entirely mixed with questions of law," with the trial focused "largely" on whether petitioners' conduct violated the statute. Br. in Opp. 6-7.

Contrary to the Government's suggestion, the factual issues disputed at trial went far beyond questions of regulatory and statutory interpretation. The issues included the amount of navigation previously occurring in

the channel, the amount of pre-existing damage to the channel, the permanence of the bottom disturbance, the credibility of witnesses, and a host of other purely factual questions. Pet. 10. Indeed, the Government itself stresses the factual nature of the issues decided at trial in arguing, in the second section of its brief in opposition, that this Court should not review those factual findings. Br. in Opp. 11. The Government cannot contend that the factual issues primarily involve regulatory and statutory interpretation when arguing against the right to a jury trial, and then turn around and assert that the same issues are purely factual matters when arguing against review of those issues by this Court.

The Government also notes that the statutory schemes at issue are "complex" and suggests that the liability issues "were beyond the jury's 'practical abilities and limitations.' " Br. in Opp. 6. Mere complexity, however, does not suffice to defeat the right to a jury trial. *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980). In addition, the factual questions in dispute concerned the conduct of defendants and the extent to which that conduct caused the damage. "These issues are the very sort which juries are traditionally called on to resolve." *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 429 (2d Cir. 1974). Finally, Congress could have provided for these factual issues to be resolved by an expert agency, subject only to appellate review, if it considered the issues too complex. In such a case there would be no right to a jury trial. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). Congress did not do so, but instead invoked the jurisdiction of the District Courts to enforce these statutes and punish transgressions. In such a case, "when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts," the right to a jury trial attaches. *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974).

The Government argues that the factual issues concededly involved in this case should not go to a jury because the remedy is equitable in nature. The lower courts have not found the issue to be so clear. As one court has noted, "it is not immediately clear whether a civil penalty can be characterized as a legal or equitable remedy." *Mosley* v. *National Finance Co., Inc.*, 440 F. Supp. 621, 622 (M.D.N.C. 1977). Judge Friendly, writing for the court in *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 423 (2d Cir. 1974), cited numerous cases to support the conclusion that "actions for statutory penalties have been held to entail a right to jury trial, even though the statute is silent, both where the amount of the penalty was fixed and where it was subject to the discretion of the court * * *."

Despite the Government's assertion of the absence of a conflict in the Courts of Appeals, there is a clear and irreconcilable tension between the decisions of the court below and in *United States* v. *Tull*, 769 F.2d 182 (4th Cir. 1985), petition for cert. pending, No. 85-1259, on the one hand, and *J.B. Williams Co.* and the cases cited therein, on the other hand. The cases involve different statutes but the same basic question of the right to a jury trial in a civil penalty case. As evidenced by the lengthy list in the appendix to the petition in *Tull*, there are scores of recently enacted statutes that provide for the imposition of what can amount to staggering civil penalties. This Court should resolve the confusion in the lower courts over whether facts can be found and sizable penalties imposed for violation of these statutes without the protection of a jury trial guaranteed by the Seventh Amendment.

2. The Government urges this Court not to review the decision of the court below that petitioners violated the Rivers and Harbors Act and the Clean Water Act, contending that these conclusions are "factbound." Br. in Opp. 10-11. This is not, however, a case in which

clear and accepted statutory guidelines were applied to the facts. On the contrary, with respect to both Acts, the court below was compelled to stretch and strain the statutory language to cover petitioners' conduct.

The Rivers and Harbors Act, intended to enhance navigation, prohibits obstruction of navigable waters. 33 U.S.C. § 403. It is difficult to discern how the very conduct of navigation—petitioners' action in this case, and what the statute was intended to promote—can be considered an obstruction of navigation. The Act also makes it unlawful "to excavate or fill" any channel unless "the work" has been approved by the Chief of Engineers. 33 U.S.C. § 403. At most this case involves incidental consequences of navigation, not intentional "work" undertaken for the purposes forbidden by the statute. As noted by amicus curiae American Institute of Merchant Shipping, the court's strained reading not only will not promote the goal of the statute—enhanced navigation—but will have the exact opposite effect of "impos[ing] severe burdens on maritime traffic." Br. of Amicus Curiae American Institute of Merchant Shipping in Support of Pet. 7.

The Clean Water Act prohibits the "discharge of a pollutant" into the navigable waters of the United States and defines "discharge of a pollutant" to include "any addition of any pollutant" to the navigable waters. 33 U.S.C. § 1311(a), 1362(12). Neither the court below nor the Government can contend that petitioners' vessel "discharged" anything into the waters as the word "discharge" is normally understood, nor that it "added" anything to the waters that was not already there. The Government argues that "addition" should be read as including "redeposit," citing *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923 (5th Cir. 1983). That case, however, involved extensive and deliberate land-clearing activities, not incidental consequences of navigation. In addition, in *Avoyelles*, material was cut and

deliberately redeposited in specific locations as fill; here there was no such purposeful activity.

The Government makes much of statements by this Court that an agency's construction of a statute it is charged with enforcing is entitled to deference. This proposition, however, "must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction * * *." *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Here the agency considers the conduct of navigation to be an obstruction to navigation, views navigation as dredging "work," and finds a "discharge" and an "addition" when nothing was emitted from petitioners' vessel or added to the waters. No deference is entitled to such strained readings adopted by an agency to extend its own jurisdiction.

For the foregoing reasons, and the reasons in the Petition, the Petition should be granted.

Respectfully submitted,

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